CHANDRU MUNIANDY v. PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
ZABARIAH MOHD YUSOF JCA
RAVINTHRAN PARAMAGURU JCA
[CRIMINAL APPEALS NO: A-05(SH)-326-06-2018
& A-05(H)-329-06-2018]
15 OCTOBER 2020

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Trafficking and possession – Appeal against conviction and sentence – Presumption of trafficking under s. 37(da) – Whether presumption rebutted – Whether conviction safe*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Conviction for trafficking in and possession of drugs – Whether accused in possession of drugs at time of raid – Whether appearance of accused upon being confronted by police could be equated with guilt – Whether cautioned statement of wife of accused correctly admitted – Whether drugs linked to third party – Whether accused had power to deal with drugs to exclusion of all other persons – Dangerous Drugs Act 1952, ss. 39B(1)(a) & 39B(2)*

The raiding officer ('SP4') led a police team on a drug raid at the house stated in the charges. SP4 and two other policemen entered the house through the front door which was not locked. They saw a woman, Tamil Selvi, later identified as the wife of the accused, in the living room. A body search on her did not result in the discovery of any incriminating items. Hearing the sound of running water coming from the toilet, SP4 knocked on the door and the accused came out. A search carried out on the accused also did not show anything incriminating. However, SP4 found a cigarette packet which had been placed on the sink of the toilet and inside it, he found nine translucent packets that contained what he suspected to be methamphetamine. SP4 brought the accused to the living room where his wife was detained. SP4 and his team continued their search of the living room. Under the television cabinet, SP4 found a packet of Nestle Milo. Inside the packet were five translucent packets suspected to contain heroin. SP4 then proceeded to the store under the staircase. SP4 found a red bag inside the store which contained a black plastic bag and inside it were 345 small translucent plastic packets that contained what he suspected to be heroin. All the searches that SP4 conducted were in the presence of the accused. Subsequent police investigation by the investigating officer revealed that the wife of the accused rented the house in question. Both the accused and his wife were arrested. The packets containing substances suspected to be drugs were sent for analysis and based on the chemist report (i) the 345 small translucent plastic packets kept in the store under the staircase contained 14.58g of heroin and 3.30g of monoacetylmorphine, the subject matter of the first charge under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), punishable under

s. 39B(2) of the same Act; (ii) the five plastic packets found under the television cabinet in the Nestle Milo packets contained 0.33g of monoacetylmorphine and 1.13g of heroin, the subject matter of the second and third charges; and (iii) the nine translucent packets found inside the cigarette packet on the sink of the toilet contained 1.32g grams of methamphetamine, the subject matter of the fourth charge. The second to fourth charges were for possession under s. 12(2) of the DDA. The accused was found guilty and convicted by the High Court on all four charges. He was sentenced to life imprisonment and 15 strokes of whipping in respect of the first charge, *ie*, the trafficking charge. In respect of the three possession charges, the accused was sentenced to 49 months' imprisonment, 50 months' imprisonment and 52 months' imprisonment respectively. The accused appealed against the conviction and sentence imposed on all the four charges, whilst the Public Prosecutor appealed against the sentence of life imprisonment that was imposed under the first charge contending that the Judicial Commissioner ('JC') erred in not passing the death sentence.

Held (dismissing appeal of accused; allowing appeal of prosecution)
Per Ravintharan Paramaguru JCA delivering the judgment of the court:

(1) When the police knocked on the door of the bathroom, the appellant looked shocked when he came out. This evidence was not necessarily incriminating as no one would expect the police to be waiting outside their bathroom. But the evidence that the appellant appeared pale when drugs were recovered near the staircase was correctly admitted and considered by the JC under s. 8 of the Evidence Act 1950. The JC did not base her finding of possession entirely on the expression of the appellant either at the bathroom or at the living room upon the discovery of the drugs. The JC considered the overall evidence in finding that the appellant was in possession of the drugs during the raid at the said rented house. (para 21)

(2) The plea of the appellant for his wife to be released and the admission that the drugs belonged to him was an inadmissible confessional statement. The appellant was under arrest by that time and no caution was administered by the raiding officer. However, despite admitting the statement and considering it in her judgment, the JC did not solely rely on the confession when finding that the appellant was in possession of the drugs. (para 21)

(3) Tamil Selvi's statement was relevant as she was in the house at the time of the raid. The prosecution had satisfied the pre-conditions for the admission of the cautioned statement of Tamil Selvi. The investigating officer had made exhaustive attempts to trace and procure Tamil Selvi's attendance in court. It was unnecessary for the investigating officer to condescend to giving every single detail of his effort to locate Tamil Selvi. In all likelihood, Tamil Selvi would have known of the impending trial as her husband was the accused and had turned up as a

defence witness at the second stage of the case. Thus, the inference that she had deliberately not shown up for the trial as a prosecution witness despite the efforts to procure her attendance could not be avoided. The recording officer's rank as an Inspector was clearly stated in the cautioned statement. Therefore, the complaint that there was no evidence whether the recording officer was an Inspector at the material time was without merit. The cautioned statement was not wrongly admitted. Even if the cautioned statement was not admitted, it would not have occasioned a gap that would have prevented the prosecution from proving a *prima facie* case. (paras 23 & 24)

(4) The defence that a third party could have been involved as the owner or trafficker of the drugs should have been raised at the earliest stage and not during the trial. The defence pertaining to the failure of the police to investigate Bob, under whose name the motorcycle was registered, was only raised when the investigating officer was recalled to testify. Furthermore, the drugs were found inside the house whereas, the motorcycle was found outside the house and no drugs were found on the motorcycle. Hence, the link of the drugs to the owner of the motorcycle was tenuous. When giving sworn testimony after the defence was called, the accused did not say that Bob was the owner or trafficker of the drugs. He merely said that Bob had access to the house because he stayed there when his wife was not around. The core defence of the accused was not that Bob was the owner or trafficker but that the police had lied about discovering the drugs inside the house. (para 26)

(5) There was no requirement to prove exclusive possession merely because the police observed the premises for only a short while before moving in. The pivotal issue was whether, at the time of the raid, the accused was in possession of the drugs. Only the accused and his wife, Tamil Selvi, were present in the house at the time of the raid. The drugs did not appear to be hidden by a third party who had access to the house in a manner that the accused, who was the occupant, would not have noticed it. Although the accused said that Bob came to stay in the house sometimes, he was not present at the time of the raid. Therefore, the JC had found that the accused was so situated to the drugs that he had the power to deal with it to the exclusion of all other persons regardless of whether he owned the drugs. (paras 27-29)

(6) It was simply not possible for the accused not to have known that there were drugs in the house. The drugs were in small packets. In fact, the red bag contained more than 300 packets of neatly packeted substance. The JC correctly drew the inference that the accused who had power to deal with the drugs found in his house, had also knowledge as to their nature. Therefore, in the face of overwhelming evidence, the JC correctly decided that the accused was in possession of the drugs, the subject matter of all four charges. (para 30)

(7) As the drug which was the subject matter of the first charge weighed more than 15g, the JC invoked the presumption of trafficking under s. 37(da) of the DDA. She disbelieved the accused and found the police officers who conducted the raid to be credible witnesses. The JC found that the presumption of trafficking was not rebutted on a balance of probabilities and that on the whole of the case, the accused failed to raise a reasonable doubt. There was no appealable error and the conviction on all four charges were safe. (para 31)

(8) Prior to 15 March 2018, the death sentence was mandatory for an offence of trafficking under s. 39B of the DDA. However, Parliament amended the punishment subsection and provided the option of a life sentence and whipping of not less than 15 strokes in limited circumstances. The new sub-s. (2A) applies when there is no evidence of buying and selling and in cases where there was no involvement of an agent provocateur or where the role of the accused is limited to being a courier. In order to invoke sub-s. (2A), the accused must satisfy limbs (a) and (d) and must also satisfy either limb (b) or (c). There was no evidence to suggest that limb (d) was satisfied. Hence, although the combined weight of the two type of drugs which was the subject matter of the charge was only slightly above the weight that attracted the presumption of trafficking under s. 37(da)(iiia), upon conviction under s. 39B and the failure of the accused to bring his case under sub-s. (2A), the JC had no alternative but to impose the death sentence. (paras 33 & 36)

Case(s) referred to:

Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Collins Chigbo Chima v. PP [2019] 1 LNS 107 CA ***(refd)***
PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(refd)***
PP v. Ismail Atan [1992] 2 CLJ 1253; [1992] 3 CLJ (Rep) 228 HC ***(dist)***

Legislation referred to:

Dangerous Drugs Act 1952, s. 37(da)(iiia), 39B(2A), (a), (b), (c), (d), First Schedule
Dangerous Drugs (Amendment) Act 2017, s. 3
Evidence Act 1950, ss. 8, 32

(Criminal Appeal No: A-05(SH)-326-06-2018)
For the appellant - Hisyam Teh Poh Teik & Charan Singh; M/s Teh Poh Teik & Co
For the respondent - Faizah Mohd Salleh; DPP

(Criminal Appeal No: A-05(H)-329-06-2018)
For the appellant - Tengku Intan Suraya Tengku Ismail; DPP
For the respondent - Hisyam Teh Poh Teik & Charan Singh; M/s Teh Poh Teik & Co

[Editor's note: For the High Court judgment, please see PP v. Chandru Muniandy [2018] 1 LNS 2163 (affirmed).]

Reported by S Barathi

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

[1] In Appeal No. A-05(SH)-326-06-2018, the accused person is the appellant. He faced four charges under the Dangerous Drugs Act 1952. Three charges, ie, the trafficking charge and two possession charges were registered under High Court Case No. 45A-14-12-2014 whereas the fourth charge which is for possession was registered under High Court Case No. 45-01-05-2016. For sake of convenience, as did the learned Judicial Commissioner in her judgment, we shall refer to the trafficking charge as the first charge and other three possession charges as the second to fourth charges. The accused was found guilty and convicted by the High Court on all four charges. He was sentenced to life imprisonment and 15 strokes of whipping in respect of the trafficking charge. In respect of the three possession charges, ie, the second to third charges, the accused was sentenced to 49 months' imprisonment, 50 months' imprisonment and 52 months' imprisonment respectively.

[2] The accused has appealed against the conviction and sentence imposed on all the four charges. In Appeal No. A-05(H)-329-06-2018, the Public Prosecutor is the appellant. The Public Prosecutor has appealed against the sentence of life imprisonment that was imposed on the accused under the first charge. For ease of reference, we shall refer to the appellant in the first appeal and the respondent in the second appeal as the accused.

The Charges

[3] At the outset, we shall set out below the said four charges:

> First Charge
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> Bahawa kamu pada 12 Mei 2014 jam lebih kurang 11.00 pagi di rumah No. 15, Lorong Jaya 10, Taman Aor Jaya, Taiping di dalam Daerah Larut Matang, di dalam Negeri Perak Darul Ridzuan telah mengedar dadah berbahaya iaitu sejumlah berat 17.88 gram (14.58 gram heroin dan 3.30 gram Monoacetylmorphines) dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.
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> Second Charge
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> Bahawa kamu pada 12 Mei 2014 jam lebih kurang 11.00 pagi di rumah No. 15, Lorong Jaya 10, Taman Aor Jaya, Taiping di dalam Daerah Larut Matang, di dalam Negeri Perak Darul Ridzuan telah memiliki dadah berbahaya iaitu sejumlah berat 0.33 gram Monoacetylmorphines dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 12(3) Akta yang sama.

A Third Charge

Bahawa kamu pada 12 Mei 2014 jam lebih kurang 11.00 pagi di rumah No. 15, Lorong Jaya 10, Taman Aor Jaya, Taiping di dalam Daerah Larut Matang, di dalam Negeri Perak Darul Ridzuan telah memiliki dadah berbahaya iaitu sejumlah berat 1.13 gram Heroin dan dengan itu kamu
B telah melakukan satu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 12(3) Akta yang sama.

Fourth Charge

Bahawa kamu pada 12 Mei 2014 jam lebih kurang 11.00 pagi di rumah
C No. 15, Lorong Jaya 10, Taman Aor Jaya, Taiping di dalam Daerah Larut Matang, di dalam Negeri Perak Darul Ridzuan memiliki dadah berbahaya iaitu 1.32 gram Methamphetamine dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 12(3) Akta yang sama.

D **Case For The Prosecution**

[4] The evidence of the essential witnesses for the prosecution may be summarised as follows. On 12 May 2014 at 10.15am, the raiding officer (SP4) led a ten-man strong police team on a drug raid at the house which is stated in the charges. The police organised themselves in three teams. SP4
E and two other policemen entered the house through the front door which was not locked. They saw an Indian woman (Tamil Selvi) who was later identified as the wife of the accused in the living room. A body search on her did not result in the discovery of any incriminating items. Soon after, SP4 heard the sound of running water coming from the toilet. He knocked the
F door and an Indian male who was identified as the accused came out. SP4 searched him but did not find anything incriminating. However, he found a cigarette packet which had been placed on the sink of the toilet. Inside it, he found nine translucent packets that contained what he suspected to be methamphetamine.

G **[5]** SP4 brought the accused to the living room where his wife was detained. SP4 and his team continued their search at the living room. Under the television cabinet, SP4 found a packet of Nestle Milo. Inside the packet were five translucent packets which SP4 suspected contained heroin. SP4 then proceeded to the store under the staircase. SP4 found a red bag inside
H the store. It contained a black plastic bag. Inside it were 345 small translucent plastic packets that contained what he suspected to be heroin. All the searches that SP4 conducted were in the presence of the accused. SP6 (KpL Ismail bin Ahmad) who was with SP4 during the search gave similar evidence. Subsequent police investigation by the investigating officer (SP7)
I revealed that the wife of the accused rented the house in question from SP2 (Ms Poon Su Ling) for RM700 a month.

[6] Both the accused and his wife were arrested. SP4 marked all the seized packets of suspected drugs and other items seized from the house. He handed them over to SP7 together with the accused and his wife. The packets containing substances that SP4 suspected to be drugs were sent to the government chemist (SP5) for analysis. The essential findings of SP5 as stated in his chemist report (P33) were as follows. The 345 small translucent plastic packets kept in the store under staircase contained 14.58g of heroin and 3.30g of monoacetylmorphine. These are the subject matter of the first charge. The five plastic packets found under the television cabinet in the Nestle Milo packets contained 0.33g of monoacetylmorphine and 1.13g of heroin. This are the subject matter of the second and third charges respectively. The nine translucent packets found inside the cigarette packet on the sink of the toilet contained 1.32g of methamphetamine. This is the subject matter of the fourth charge. SP5 also stated that heroin, monoacetylmorphine and methamphetamine are listed in First Schedule of the Dangerous Drugs Act 1952.

Findings Of High Court At The End Of Prosecution Case

[7] The learned Judicial Commissioner found that there was a *prima facie* case against the accused and she called for his defence on all four charges. She considered the evidence in respect of the main ingredients of the offence, ie, whether the drugs in question were dangerous drugs, whether the accused was in possession of the same and in respect of the first charge, whether a trafficking offence had been proved under the Dangerous Drugs Act 1952.

[8] The learned Judicial Commissioner found that there was no break in the chain of evidence pertaining to the suspected drugs that were discovered by the police. The packets containing suspected drugs seized by the raiding officer were sent by the investigating officer to the government chemist for analysis. The finding of the government chemist was that all the packets in question contained dangerous drugs as stated in his report. Her Ladyship also noted that the defence did not dispute the findings of the government chemist.

[9] On the element of possession, the learned Judicial Commissioner found that the accused was in actual possession of the drugs mentioned in all the four charges at the time of arrest. Briefly stated, Her Ladyship's reasons were as follows. She accepted the evidence of SP4 and SP6 that the accused looked shocked, pale and anxious when he was confronted by the police. The evidence of SP4 and SP6 established that only the accused and his wife were in the house at the time of the raid. The police also found personal belongings of the accused in the house. She inferred from the evidence that the accused was in occupation of the house although the tenancy agreement with the landlord was executed by his wife. Her Ladyship found for the foregoing

reasons that the accused had the power to deal with the drugs found in the toilet, under the television cabinet and in the store. SP4 told the court that the accused admitted that the substances in the packets in question belonged to him and pleaded for his wife to be released. Her Ladyship also took this admission into consideration. In respect of the first charge, as the weight of the drugs exceeded 15g, she applied the presumption of trafficking under s. 37(da) of the Dangerous Drugs Act 1952.

The Defence

[10] The accused gave sworn testimony in his defence. The house was rented from a Chinese man for RM700 a month. Their respective wives signed the tenancy agreement. The accused worked as a lorry assistant. He said that his employer was Bob who sometimes stayed at his house at night. The accused's wife did not stay in the house as she was undergoing treatment at the Sungai Petani Hospital since 2013. On the day before the arrest, the accused gave "Bob" a set of keys to the house and allowed him to stay there at night. The accused went to Sungai Petani the same afternoon and returned to the house in question with his wife the following morning at 8.30am. He noticed that Bob's motorcycle was still parked outside the house. He was arrested as he emerged from the bathroom. He said that the police seized a cigarette packet from the bathroom. But he said that a red bag was discovered by the police after a search outside the house in the rubbish bin enclosure. He was told that there were over 300 plastic packets inside it.

[11] The only witnesses called on his behalf were Insp Mohd Zaki bin Mohd Radzi (SD2) and the wife of the accused (SD3). SD2 dealt with the forfeiture investigation arising from the raid. He confirmed that the motorcycle found outside the house belonged to one Mohamad Azmil who had been referred to as Bob by the accused. However, the said Mohamad Azmil did not stake a claim to the motorcycle during forfeiture proceedings although his family was served with the notice of seizure. Only the financier of the motorcycle filed a claim. He was unable to trace the said Mohamad Azmil. As for SD3, her evidence was similar to that of her husband, ie, the accused. She claimed that the police discovered the red bag outside the house.

Findings Of The Trial Judge At The End Of The Case For The Defence

[12] The learned Judicial Commissioner found that the main defence of the accused which was supported by his wife was that the drugs were found outside the house by the police and not in various places inside the house. In other words, the defence is that the police witnesses lied when they told the court that the drugs were found inside the house that was occupied by accused and his wife. Her Ladyship found that the defence failed to raise any doubt on the case of the prosecution that the drugs were found inside the

house. She found that the SP4 and SP6 had no reason to frame the accused. The accused never lodged any police report after his arrest to claim that he had been framed. There was no evidence as well that he told the investigating officer (SP7) that he was framed by SP4. In his court testimony as well, the accused did not say that SP4 was out to frame him or had any reason to do so.

[13] The learned Judicial Commissioner also considered the defence that someone other than the accused had access to the house and could therefore be the owner of the drugs. She found no evidence to support this defence. This defence was not raised at the earliest opportunity after arrest or at the beginning of the trial. It was only raised when the investigating officer (SP7) was recalled after change of counsel for the accused. Even so, the investigating officer (SP7) said emphatically that the accused never told him that Bob had access to the house. In respect of the evidence of the wife of the accused that Bob sometimes stayed in the house, Her Ladyship found that her evidence is not credible as she normally stayed in Sungai Petani and admitted that she never met Bob. In the premises, she found that the prosecution had proved beyond reasonable doubt that the accused possessed the drugs in question. In respect of the first charge, she found that the defence did not rebut the presumption of trafficking.

Issues

[14] Learned counsel for the accused raised two broad grounds in his submissions. Firstly, he submitted that the learned Judicial Commissioner erred in making a finding of direct possession against the accused in respect of the drugs in question. Secondly, he submitted that the learned Judicial Commissioner failed to sufficiently appreciate the defence of the accused.

[15] The issues addressed by counsel for the accused to support the above grounds are as follows. He submitted that the learned Judicial Commissioner made a number of errors in finding that his client was in possession of the drugs at the time of the raid. He said that the learned Judicial Commissioner erred in stating in her judgment that the accused looked shocked, pale and anxious when SP4 introduced himself as a policeman. He pointed out that SP4 said that the accused looked shocked only at their initial encounter outside the bathroom. Only after the drugs were discovered, the accused looked pale and anxious. In any event, he submitted that looking shocked is neutral evidence and cannot be necessarily equated with guilt. Furthermore, the accused was taking a bath when the policemen confronted him.

[16] Secondly, he submitted that the learned Judicial Commissioner failed to reject the confession of the accused that the drugs belonged to him and his accompanying plea for the release of his wife as no caution was administered and that the confession cannot be voluntary in the circumstances of the case.

[17] Thirdly, he submitted that that the cautioned statement (P36) of the wife of the appellant was wrongly admitted into the evidence. He said the prerequisites of s. 32 of the Evidence Act 1950 were not met and that there was no evidence that the recording officer (SP8) was of the rank of Inspector or above.

[18] The fourth issue he submitted was in respect of the alleged role of Bob in the affair. Counsel for the appellant submitted that evidence of the presence of the motorcycle belonging to Bob was only disclosed by the investigating officer (SP7) when he was recalled by the defence. Thus, both the raiding officer (SP4) and the investigating officer (SP7) had knowledge of the presence of the motorcycle outside the house. However, the investigating officer failed to investigate Mohamad Azmil in connection with the discovery of the drugs.

[19] The fifth issue is related to the assessment of the evidence in respect of possession. Counsel for the accused submitted that the raid was carried out only after a few minutes of observation. Therefore, the prosecution must exclude access of other persons to the drugs. Furthermore, it was submitted that there was no proximity between the accused and the drugs.

Decision

[20] We find no merit in the main grounds of appeal and the issues argued before us. Our reasons are as follows.

[21] In respect of the argument that the learned Judicial Commissioner made a mistake in stating in her grounds that the appellant looked shocked and pale when he came out of the bathroom when in fact the raiding officer (SP4) said he looked shocked only, we find that this is not a material error that affected her finding in respect of possession. The learned Judicial Commissioner considered the overall evidence in finding that the appellant was in possession of the drugs during the raid at the said rented house. From a reading of the notes of proceeding, it cannot be disputed that when the police knocked on the door of the bathroom, the appellant looked shocked when he came out. We agree with counsel for the accused that this evidence is not necessarily incriminating as no one would expect police to be waiting outside their bathroom. But the raiding officer (SP4) did said that the appellant appeared pale (pucat) when drugs were recovered near the staircase. This evidence was correctly admitted and considered by the learned Judicial Commissioner under s. 8 of the Evidence Act 1950. But, in any event, Her Ladyship did not base her finding of possession entirely on the expression of the appellant either at the bathroom or at the living room upon discovery of drugs. We shall advert to the other evidence that she considered in the later part of this judgment. Similarly, we would agree with counsel for the accused that the plea of the appellant for his wife to be released and the admission that the drugs belonged to him is an inadmissible confessional statement. The appellant was under arrest by that time and no

caution was administered by the raiding officer (SP4). However, despite admitting this statement and considering it in her judgment, she did not solely rely on the confession when finding that the appellant was in possession of the drugs.

[22] The third issue was that the cautioned statement of the wife of the appellant (Tamil Selvi) was wrongly admitted into evidence under s. 32 of the Evidence Act 1950. We find no merit in this issue for the following reasons. The investigating officer (SP7) told the court that Tamil Selvi was not charged in this case but was released when she signed a bond to appear as a prosecution witness. However, he was unable to locate her despite attempts made to serve the subpoena at her parents' house in Sungai Petani. He could not find her at the Kuala Lumpur address that Tamil Selvi gave him. He made further attempts to trace her through the Immigration Department, Astro television provider, Election Commission and the National Registration Department but to no avail. The relevant limb of s. 32 that was invoked by the prosecution reads as follows

> **32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant**
>
> (1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> (i) when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law; ...

[23] The learned Judicial Commissioner found that the prosecution satisfied the preconditions for the admission of the cautioned statement of Tamil Selvi. We find nothing wrong with the said finding of the learned Judicial Commissioner. Tamil Selvi's statement is certainly relevant to the case as Tamil Selvi was in the house at the time of the raid. She told the recording officer that she did not know anything about the drugs as she had just returned to the house from Sungai Petani. The investigating officer (SP7) gave evidence in court about the exhaustive attempts made to trace Tamil Selvi and procure her attendance in court. Tamil Selvi had even been asked to execute a bond to appear in court and give evidence. Counsel for the accused submitted that the investigating officer (SP7) did not produce the Kuala Lumpur address of Tamil Selvi and tender evidence that he called her handphone number. We find it to be immaterial. SP7 stated that he had made effort on information given to him to trace her and that he failed. The learned Judicial Commissioner accepted his evidence. We find it unnecessary that he must be condescended to give every single detail of his effort to locate her. In all likelihood, Tamil Selvi would have known of the impending trial as

her husband was the accused. In fact, she turned up as a defence witness at the second stage of the case. Thus, the inference that she had deliberately not shown up for the trial as a prosecution witness despite the efforts to procure her attendance cannot be avoided. Counsel for the appellant also submitted that there was no evidence whether the recording officer (SP8) was an Inspector at the material time. It is true that when the recording officer (SP8) gave evidence, the learned Deputy Public Prosecutor did not elicit evidence in respect of her rank. However, we find no merit in the complaint for the following reason. Her rank as an Inspector is clearly stated in the cautioned statement. The case of *PP v. Ismail Atan* [1992] 2 CLJ 1253; [1992] 3 CLJ (Rep) 228 that was cited by counsel for the accused persons can be distinguished. In that case as well, evidence was not elicited whether the recording officer had attained the rank of Inspector when he recorded the cautioned statement. However, it is not stated in the judgment whether the rank of the recording officer was stated in the cautioned statement and that the court considered it. In the premises, there is no merit in the suggestion that the pre-conditions of s. 32 were not satisfied.

[24] In any event, the cautioned statement is evidence that was untested by cross-examination to which not too much weight can be attached. From our reading of the judgment of the learned Judicial Commissioner, Her Ladyship only noted that Tamil Selvi said that the drugs did not belong to her and that the premises were rented by her husband but her name was used in the rental agreement. She did not accuse her husband of possessing or owning the drugs in the statement. We find that the statement was not wrongly admitted. In any event, there was evidence elicited from the raiding officer (SP4) that the accused and his wife lived in the house at the time of the raid. In the premises, even if the cautioned statement was not admitted, it would not have occasioned a gap that would have prevented the prosecution from proving a *prima facie* case.

[25] The fourth issue raised by counsel for the accused is that the investigating officer (SP7) had failed to sufficiently investigate Bob's role in the discovery of the drugs although the motorcycle that was registered in his name was found outside the house. The police were aware of the owner of the motorcycle as it was the subject of forfeiture of property investigation by another investigating officer (SD2).

[26] The suggestion that the said Bob is either the owner or the true trafficker of the drugs is implicit in the argument that the police should have investigated him. However, the following facts militate against absolving the accused for the alleged failure of the police to investigate Bob. The defence pertaining to the failure of the police to investigate Bob was only raised when the investigating officer was recalled to testify. Tamil Selvi who was also arrested during the raid did not mention Bob in her cautioned statement.

When she gave evidence at the defence stage, she agreed that she never saw him. As stated by this court in the case of *Collins Chigbo Chima v. PP* [2019] 1 LNS 107, the defence that a third party could have been involved as the owner or trafficker of the drugs should be raised at the earliest stage and not during the trial. Furthermore, the drugs in the instant case were found inside the house whereas the motorcycle was found outside the house. The police did not find any drugs on the motorcycle. The link of the drugs to the owner of the motorcycle is tenuous. It is also important to note that the accused when giving sworn testimony after the defence was called did not say that the said Bob was the owner or trafficker of the drugs. He merely said that Bob had access to the house because he stayed there when his wife (Tamil Selvi) was not around. The core defence of the accused is not that the said Bob was the owner or trafficker but that the police had lied about discovering the drugs inside the house. The accused said no drugs were found inside the house. He also said that the police found the red bag containing more than 300 packets of drugs in the rubbish bin enclosure outside the house. For all the above reasons, we find no merit in the above issue.

[27] In respect of the fifth issue that the prosecution's case must exclude possession of the drugs by other persons, we find no merit in such contention. The learned Judicial Commissioner dealt with this issue at length by relying on several oft-cited cases including the celebrated case of *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] 1 MLJ 237 and the more recent Federal Court case of *PP v. Denish Madhavan* [2009] 2 CLJ 209; [2009] 2 MLJ 194. We are of the view that the learned Judicial Commissioner applied the correct law on the issue of possession. We find that there is no requirement to prove exclusive possession merely because the police observed the premises for only a short while before moving in. The pivotal issue is whether at the time of the raid, the accused was in possession of the drugs. As pointed out by the Federal Court in *PP v. Denish Madhavan* (*supra*), there is no obligation on the part of the prosecution to prove that the accused alone had exclusive possession of the drug. The element of exclusivity has nothing to do with being the sole possessor or being the sole owner of the offending article. Otherwise, two or more persons can never be charged with being in joint possession of an article. The element of exclusivity has to do with the power of the accused to deal with the article in question to the exclusion of others regardless of the fact whether he jointly possesses or owns the said article or whether someone else owns it.

[28] We also find that the learned Judicial Commissioner assessed the evidence correctly in respect of possession. At the time of the raid, only the accused and his wife, Tamil Selvi, were present in the house. Tamil Selvi had just returned from her mother's house in Sungai Petani where she was staying. She said in her cautioned statement that she has no knowledge of the drugs. It was not the defence of the accused at the time of the raid or later

that the drugs belonged to his wife or that she was in possession of it. Tamil Selvi also said that it was the accused who rented the house although she was the tenant on paper. The accused did not dispute this fact in his sworn testimony. The raiding officer (SP4) found the drugs that were the subject matter of the fourth charge on the sink after the accused emerged from the bathroom. The drugs in respect of the other charges were found at the store below the staircase and below the television cabinet. They did not appear to be hidden by a third party who had access to the house in a manner that the accused who was the occupant would not have noticed it. As we said earlier, there was no one else in the house apart from the accused and his wife at that time. Furthermore, Tamil Selvi said that she ordinarily stayed at her mother's house in Sungai Petani. Although the accused said that the said Bob came to stay in the house sometimes, he was not present at the time of the raid. The accused did not tell the police about Bob. The accused claimed that he told the police that he mentioned the name of Bob but the learned Judicial Commissioner accepted the evidence of the police witnesses on this point. Tamil Selvi also said when she gave sworn evidence at the defence stage there was a skirt in the house that was not hers. But she agreed that she never met Bob and no one else was present in the house. She did not say that she queried her husband about the purported presence of the skirt of another women in the house either.

[29] Therefore, we are of the view that the learned Judicial Commissioner correctly found that the accused was so situated to the drugs that he had the power to deal with it to the exclusion of all other persons regardless of whether he owned the drugs.

[30] In respect of the element of knowledge, we are of the view that the learned Judicial Commissioner correctly took into account his conduct upon the discovery of the drugs in the living room. As we noted earlier, Her Ladyship may have erred in stating that the accused also looked pale (pucat) as he emerged from the bathroom when the evidence of the raiding officer (SP4) was that he looked shocked only. But the raiding officer (SP4) did say that he was pale (pucat) and anxious (cemas) when drugs were discovered in the living room. It is simply not possible for the accused not to have known that there were drugs in the house. The drugs were in small packets. In fact, the red bag contained more than 300 packets of neatly packeted substance. As stated by the eminent authorities cited by the learned Judicial Commissioner, intention is a matter of inference. We find that she correctly drew the inference that the accused who had power to deal with the drugs found in his house, had also knowledge as to their nature. Therefore, in the face of overwhelming evidence, we find that the learned Judicial Commissioner correctly decided that the accused was in possession of the drugs that are the subject matter of all four charges.

[31] As the drug which is the subject matter of the first charge weighed more that 15g, the learned Judicial Commissioner invoked the presumption of trafficking under s. 37(da) of the Dangerous Drugs Act 1952 upon the invitation of the prosecution. She disbelieved the accused who told the court that the police framed him as the red bag containing the 345 packets of drugs was found outside the house in the rubbish bin and that no drugs were found inside. She found the police officers who conducted the raid to be credible witnesses. She found that the presumption of trafficking was not rebutted on a balance of probabilities and that on the whole of the case, the accused failed to raise a reasonable doubt. Having considered all the issues raised by counsel for the accused that we discussed earlier, we find that the learned Judicial Commissioner committed no appealable error and that the conviction on all four charges to be safe. We accordingly affirm the conviction of the accused on all four charges.

Appeal Against Sentence By Prosecution

[32] In respect of the first charge, ie, the trafficking charge, the learned Judicial Commissioner sentenced the accused to life imprisonment from the date of his arrest and 15 strokes of the rotan. In respect of the second charge, the accused was sentenced to 49 months' imprisonment from the date of arrest. In respect of the third charge, the accused was sentenced to 50 months' imprisonment from the date of arrest. In respect of the fourth charge, the accused was sentenced to 52 months' imprisonment from the date of arrest.

[33] The prosecution appealed against the life sentence meted out for the trafficking charge. The learned DPP submitted that the learned Judicial Commissioner erred in not passing the death sentence. Prior to 15 March 2018, the death sentence was mandatory for the offence of trafficking under s. 39B of the Dangerous Drugs Act 1952. However, Parliament amended the punishment in subsection of s. 39B through Dangerous Drugs (Amendment) Act 2017 (Act A1558) and provided the option of a life sentence and whipping of not less than 15 strokes in limited circumstances. The new punishment subsections of s. 39B are as follows:

> (2) Any person who contravenes any of the provisions of sub-s. (1) shall be guilty of an offence against this Act and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, be punished with whipping of not less than fifteen strokes.
>
> [(2) Subs. Act A1558: s. 2]
>
> (2A) In exercising the power conferred by subsection (2), the Court in imposing the sentence of imprisonment for life and whipping of not less than fifteen strokes, **may have regard only to the following circumstances**:
>
> (a) there was no evidence of buying and selling of a dangerous drug at the time when the person convicted was arrested;

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(b) there was no involvement of agent provocateur; **or**

(c) the involvement of the person convicted is restricted to transporting, carrying, sending or delivering a dangerous drug; **and**

(d) that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.

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(emphasis added)

[34] Before we proceed to discuss the applicability of sub-s. (2A) to the facts of the instant case, we would state at the outset that we agree with the submission of counsel for the accused person that the provision has retrospective effect. Section 3 of the Dangerous Drugs (Amendment) Act 2017 (Act A1558) provides as follows:

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(1) In this section, "appointed date" means the date appointed under subsection 1(2) of this Act.

(2) Any proceedings against any person who has been charged, whether or not trial has commenced or has been completed, and has not been convicted under section 39B of the principal Act by a competent Court before the appointed date, shall on the appointed date be dealt with by the competent Court and **be continued under the provisions of the principal Act as amended by this Act**. (emphasis added)

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In our view, the effect of the transitional provision is that as long as an accused has not been convicted by the date of coming into force of the new sub-s. (2A), it is applicable regardless of the date the offence was committed. In the instant case, the offence was committed on 12 May 2014. The accused was convicted on 8 June 2018 which was after the coming into force of the amending Act on 15 March 2018. Therefore, sub-s. (2A) can be invoked in the instant case if the pre-conditions are satisfied. It is also our view that the pre-conditions in sub-s. (2A) are mandatory because of the imperative "only" in the words "may have regard only to the following circumstances".

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[35] In invoking sub-s. (2A), the learned Judicial Commissioner reasoned as follows:

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For the first charge, it is my considered view that the facts of this case clearly discloses that there was no evidence of buying and selling of dangerous drug at the time when the person convicted was arrested, there was no involvement of Agent Provocateur and the impugned drugs were not found on his person (body) and therefore it is my view that the circumstances of this case meets the criteria for this court to invoke section 39B(2A) DDA.

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[36] The learned Deputy Public Prosecutor submitted that limb (d) must be satisfied before the discretion not to impose a death sentence can be exercised. We find that there is merit in this submission. It is clear that the disjunctive "or" applies only to limbs (b) and (c). It follows that the sub-s. (2A) applies when there is no evidence of buying and selling and in cases

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where there was no involvement of an agent provocateur or where the role of the accused is limited to being a courier. However, the conjunctive "and" appears between limbs (c) and (d). Thus, limb (d) must be compulsorily satisfied just as in in the case of limb (a). To put it in another way, our view is that in order to invoke sub-s. (2A), the accused must satisfy limbs (a) and (d) and must also satisfy either limb (b) or (c). In the instant case, there was no evidence to suggest that limb (d) was satisfied. Therefore, we find that the learned Judicial Commissioner erred in imposing life sentence for the trafficking charge. Although, the combined weight of the two types of drugs which are the subject matter of the charge is only slightly above the weight that attracts the presumption of trafficking under s. 37(da)(iiia), upon conviction under s. 39B and the failure of the accused to bring his case under sub-s. 2A, the learned Judicial Commissioner had no alternative but to impose the death sentence. We also note that the accused had appealed against the entire decision which includes the sentences meted for the other three possession charges. Given the weight of the drugs in the possession charges, we find that interference with the sentence is not warranted.

Conclusion

[37] In conclusion, we dismiss the appeal of the accused against the conviction on all four charges and the sentence on the possession charges. We allow the appeal of the prosecution against the sentence of life imprisonment on the first charge and set it aside and in its place substitutes an order that the accused be sentenced to death.